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# Virginia Law Register

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## FUND RECOVERED BY PERSONAL REPRESENTATIVE IN ACTION FOR WRONGFUL DEATH AS CONSTITUTING ASSETS FOR PAYMENT OF FUNERAL EXPENSES.

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Does a fund recovered by the personal representative in an action for the wrongful death of his decedent, whether under the Federal Employers Liability Act, or the Virginia Statute, constitute assets in his hands liable for the payment of funeral expenses? Advice on this question is asked in a case where the deceased was survived by his wife and three children, and left no assets, and the funeral was ordered by his brother.

Virginia Code, sec. 2660, provides:

“When the assets of the decedent in the hands of his personal representative, after the payment of funeral expenses and charges of administration, are not sufficient for the satisfaction of all demands . . . . .”

This statute plainly prefers funeral expenses, but it must be observed that the assets liable are “the assets of the decedent.” Assets consist of such property of a decedent as constitutes a personal representative liable to creditors or legatees to the extent thereof. 3 Minor’s Inst. 583. Necessary funeral expenses are allowed before all other debts or charges; and the personal representative is personally liable therefor to the whole extent, if he ordered the funeral, and if he did not order it, to the extent of the goods which came or might have come to his hands. 3 Minor’s Inst. 573. Therefore, the question to be determined is whether the fund in this case constitutes the property of the decedent, within contemplation of the law.

The common law provides no civil redress for injuries resulting in death. 4 Minor’s Inst. 454, 455. Actions for torts are not maintainable by or against the personal representatives of the parties concerned at common law, and therefore are at common law not revivable, the common law maxim as to them being

"actio personalis moritur cum persona." In this doctrine innovations have by degrees been introduced by statute. 4 Minor's Inst. 975.

The relief being statutory, we must necessarily observe and be governed by the provisions of the statute.

#### FEDERAL STATUTE.

It appears that under the Federal Employers' Liability Act, the action is not for the benefit of the estate, but for the benefit of the surviving widow or husband and children, &c., of such employee. 19 V. L. R. page 420.

Under the Federal Act, the estate of a deceased employee is not entitled to any damages by reason of his death. Robert's Federal Liability of Carriers, p. 1091, sec. 619.

An allowance by a jury in an action under the Federal Act for a sum of money for funeral expenses, was erroneous. The statute makes no provision to compensate the relatives for the expenses of burial. Robert's Federal Liability of Carriers, p. 1093, sec. 622.

In the distribution of any money received by an administrator of a deceased employee of a common carrier by railroad killed within the terms and conditions of the Federal Act, a state statute of Descents and Distribution does not control, but the money must be paid to the beneficiaries named in the Federal statute. Robert's Federal Liability of Carriers, p. 1082, sec. 613.

"In addition to the above, it seems to me that the trial court, under objection by counsel for the defendant, improperly received testimony as to the obligation for the funeral expenses of the decedent. The Federal Employers' Liability Act provides that the damages in case of death of an employee are for the benefit of the next of kin dependent upon such employee, for such injury or death. No provision seems to be included or intended by the Federal Act to compensate for the expenses of burial . . . ." *Collins v. Pennsylvania R. Co.*, 163 N. Y. App. Div., p. 459.

#### VIRGINIA STATUTE.

Virginia Code, sec. 2904, provides:

"The amount recovered in any such action shall be paid to

the personal representative, and after the payment of costs and reasonable attorney's fees, shall be distributed by such personal representative to the wife, husband and child . . . .  
 . . . . in such proportions as the jury may have directed  
 . . . . and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, child; parent, brother or sister, the amount so received shall be assets in the hands of the personal representative to be disposed of according to law. . . . ."

Construing the Virginia statute, the court, *Richmond, &c. R. Co. v. Martin*, 102 Virginia, p. 203, held: "The primary object of the statute in allowing an action to recover damages for death by wrongful act of another, was to compensate the family of the deceased, and was not in the interest of the general estate. (Citing secs. 2903 and 2905 of the Code.) It will be observed that by the express language of the statute the damages awarded cannot become assets in the hands of the administrator to be disposed of according to law, if the decedent is survived by a wife. . . . or child; and the recovery is also made free from all debts of the decedent, thus leaving no doubt of the legislative intent to treat the recovery as wholly independent of the decedent and his estate in the event of the survival of any one of the enumerated kin, and make it enure directly and personally to such next of kin by force of the statute, and not derivatively from the decedent, to whom it never belonged, either in fact or in contemplation of law."

#### GENERALLY.

In *re McDermott's Estate*, 99 N. Y. Supp. p. 829, is instructive and also suggestive. It is there held:

" . . . . Prior to the amendment made to section 1903 of the Code of Civil Procedure by Laws 1904, p. 1285, C. 515, damages recovered in such an action (for negligent killing of intestate) were required to be distributed by the plaintiff as if they were unbequeathed assets left in his hands after payment of all debts and expenses of administration. No provision of statute authorized their use for funeral expenses. The amendment of 1904 made the second sentence of the section read as

follows: 'But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent, and his commissions upon the residue' . . . The purpose of the Legislature by the amendment plainly was to provide for the payment of funeral expenses out of damages recovered in actions for causing death."

The declaration in the instant case alleges that the cause of action arose in interstate commerce, and that the right of action is under the acts of Congress; but the whole matter, both of law and fact, was submitted to the judge under a compromise agreement, and the order entered by the court directs:

" . . . And it appearing further to the court that the plaintiff's decedent left surviving him a widow . . . . . and three children . . . . . it is considered by the court that the said . . . . . administrator . . . . . do hold the said sum of money for the use and benefit of the widow and children . . . . . aforesaid, and pay the same over to them or properly qualified guardians of the infants in equal shares . . . . . "

My opinion is, and I so advise, that the fund is not chargeable with the funeral expenses, but should be paid over to the widow and properly qualified guardians of the infant children, in equal shares.

ISADOR SHAPIRO.

*Richmond, Va.*